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No. 87-896

In the Supreme Court of the United States

OCTOBER TERM, 1987

WILLIAM A. FOSTER, JR.,
PETITIONER,

v.

JAMES R. PEDDICORD,
RESPONDENT.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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December 21, 1987

QUESTION PRESENTED

Is an action involving injuries received from striking bottom while diving from an anchored yacht beyond the scope of the admiralty jurisdiction of the federal courts?

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The respondent, James R. Peddicord, respectfully prays that this Court deny the Petition for Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on August 26, 1987.

REASONS FOR DENYING THE WRIT

I.

THERE IS NO SPLIT AMONG THE CIRCUITS.

While the question of federal maritime jurisdiction over diving accidents does not arise frequently, the issue is not one of first impression. In every case respondent has located involving a diving accident, federal maritime jurisdiction was denied. *See Onley v. South Carolina Electric & Gas Company*, 488 F.2d 758 (4th Cir. 1973); *Chapman v. City of Grosse Pointe Farms*, 385 F.2d 962 (6th Cir. 1967); *Smith v. Knowles*, 642 F. Supp. 1137 (D. Md. 1986); *American National Bank and Trust Company of Waukegan v. United States*, 636 F. Supp. 147 (N.D. Ill. 1986); *Reed v. United States*, 604 F. Supp. 1253 (N.D. Ind. 1984). In light of this precedent, petitioner cannot and does not claim that a split exists among the circuits.

II.

THE PETITION DOES NOT RAISE AN IMPORTANT QUESTION OF FEDERAL LAW.

Petitioner seeks to justify the issuance of a writ of certiorari in the instant case by claiming that an important question of federal law is presented. Petitioner does not explain why the diving accident is of importance to the development of federal maritime law, but instead seeks to bootstrap his argument by advancing the tenuous proposition that the diving accident was related to the navigation of the vessel in question.

In *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249 (1972), this Court expanded the traditional locality test for jurisdiction over tort actions by additionally requiring that the alleged wrong "bear a significant relationship to traditional maritime activity." *Id.* at 268. In *Foremost Insurance Co. v. Richardson*, 457 U.S. 668 (1982), this Court considered whether recreational boating was traditional maritime activity. Isolating the navigational aspects of boating, *id.* at 674-77, the Court stated that "the negligent operation of a vessel on navigable waters . . . has a sufficient nexus to traditional maritime activity to sustain admiralty jurisdiction in the District Court." *Id.* at 674. Following the lead of this Court, the Fourth Circuit sustained jurisdiction when navigational negligence injured a water skier, *Hogan v. Overman*, 767 F.2d 1093 (4th Cir. 1985), but not when a water skier was injured by the alleged negligence of another skier, *Souther v. Thompson*, 754 F.2d 151 (4th Cir. 1985).

Petitioner stretches to achieve jurisdiction in this case by claiming that he was injured because of a navigational fault. In actuality, respondent anchored his small vessel in relatively shallow water for recreational purposes. Petitioner does not maintain that any danger to the vessel

resulted from the manner in which it was anchored, or that it created any danger to other vessels. Indeed, no danger was presented until petitioner dove into the water and injured himself. Petitioner is unable to cite a single case in which such activity has been deemed navigational in nature. The term "navigation" clearly connotes activities involving the steering and propelling of a vessel. It does not and cannot include the conduct of those on board an anchored vessel which bears no relationship to the safety either of that vessel or of other vessels in the vicinity.

Moreover, to grant jurisdiction on these facts would interfere with important state interests. As one court has noted:

> The uniform body of rules and the expertise of admiralty are irrelevant to the issues in a diving accident. Conversely, the state tort law is most directly concerned with such accidents, and is quite capable of resolving the present controversy without any effect on the federal interest in maritime activities.

Onley v. South Carolina Electric & Gas Company, 488 F.2d 758, 760 (4th Cir. 1973) (footnote omitted). In such situations, this Court has warned of the dangers of usurpation of jurisdiction by federal courts over matters not clearly directed by Congress to be within admiralty jurisdiction. *See Executive Jet Aviation*, 409 U.S. at 272-73.

III.

THIS COURT HAS DISAPPROVED JURISDICTION OVER SIMILAR ACCIDENTS

Not only is the issue presented by this petition not an important question of federal law, it is one on which this Court has spoken. While not specifically so holding, this Court noted that when a swimmer is injured by striking the bottom, "the invocation of admiralty jurisdiction

seems almost absurd." *Executive Jet Aviation*, 409 U.S. at 255. The Court in *Executive Jet Aviation* went on to discuss with apparent approval the decision in *Chapman v. City of Grosse Pointe Farms*, 385 F.2d 962 (6th Cir. 1967), which denied jurisdiction over claims by a swimmer for injuries allegedly sustained in diving from a public pier. The Court cited language from *Chapman* which stated that the factors surrounding that diving accident were "quite immaterial to any meaningful invocation of the jurisdiction of admiralty courts." 409 U.S. at 256 (*quoting Chapman v. City of Grosse Pointe Farms*, 385 F.2d at 966). This apparent disapproval of jurisdiction over swimming accidents was noted again by this Court in *Foremost Insurance Co. v. Richardson*, 457 U.S. 668, 674 n.4 (1982).

The present case requires the same result. The fortuitous fact that petitioner dove from an anchored yacht afloat on navigable waters rather than from a pier equally removed from the shoreline cannot create admiralty jurisdiction where clearly none would otherwise have existed. This is the very type of case which this Court in *Executive Jet Aviation* rejected as a claimed basis of federal maritime jurisdiction.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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